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IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 455

In the Matter of

ANONYMOUS, an Attorney,

Petitioner,

against

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LEONARD FELDMAN,
Attorney for Petitioner,
350 Fifth Avenue,
New York, New York.

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The petitioner above described[1] respectfully prays that a writ of certiorari issue in the above captioned case, directed to the Court of Appeals of the State of New York, to review its order dated May 20, 1965, and entered in the office of the Clerk of the Court of Appeals of the State of New York on May 20, 1965. (See Appendix and certified record submitted herewith.)

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1. Under Section 90, New York Judiciary Law, anonymity is afforded a respondent-attorney during the pendency of a disciplinary proceeding.

Opinions Below

There were no opinions in the courts below.

Jurisdiction

The order of the Court of Appeals sought to be reviewed was dated and entered May 20, 1965. Therefore the time within which this petition for a writ of certiorari might be filed will expire on August 18, 1965.

The jurisdiction of this honorable Court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below

Petitioner is the respondent in a disciplinary proceeding brought against him by the Co-ordinating Committee on Discipline (hereinafter referred to as the "respondent").

Pursuant to the practice of the Appellate Division, a Referee was appointed to take testimony and report to the Appellate Division, First Department (before whom the disciplinary proceeding is pending). Hearings commenced before the Referee and the Co-ordinating Committee on Discipline presented its proof. At the close of the respondent's case, petitioner moved before the Referee (A 13a-16a)[2] for a discovery and inspection.[3] The Referee did not rule on the motion, but instead remitted the matter to the Appellate Division, First Department, on the ground that such a motion for discovery properly lay before that Court (A 15a-16a).

By motion duly made, the petitioner moved for an order directing the Co-ordinating Committee on Discipline to disclose to the petitioner all statements, testimony or

2. Parenthetic references are to Appendix annexed hereto unless otherwise noted.

3. See Appendix page 1a for the procedural history of a prior motion for discovery and inspection made by the petitioner here.

documents relating thereto in the possession of the Co-ordinating Committee and by whomsoever made and relating to the issues before the Referee which had not already been disclosed to the petitioner (A 5a). By order dated and entered on March 18, 1965, the said motion was denied in all respects (A 4a). There was no opinion written by the Appellate Division and no publication of the order of denial.

Thereafter, the petitioner here timely moved for leave to reargue the said motion, or in the alternative for leave to appeal to the Court of Appeals of the State of New York. The said motion for reargument, or in the alternative for leave to appeal, was denied in all respects by the Appellate Division by order dated and entered April 13, 1965 (A 46a). There was no opinion and no publication of said order.

Thereafter, the petitioner here moved for leave to appeal to the Court of Appeals of the State of New York.[3a] By order dated May 20, 1965, the Court of Appeals denied the said motion; N. Y. 2d (A 2a). There was no opinion written by the Court of Appeals.

Questions

1. Where a judicial prosecuting agency, after presentation and conclusion of its entire case against an attorney in a disciplinary proceeding, admits that it still has undisclosed evidence in its possession relating to the principal issues in such proceeding, but refuses to disclose such evidence even though a demand has been made therefor, does such refusal to disclose constitute a denial of due process within the contemplation of the Constitution of the United States?

3a. See certified record submitted with this petition.

2. In the absence of any statute or rule of court sanctioning such a denial, may an attorney accused in a disciplinary proceeding designed to deprive him of his right to practice law, be denied the use of usual, ordinary, normal and regular discovery procedures, especially when such remedies are available by statute to all other litigants in the State of New York and disclosure can no longer prejudice the prosecution because it has concluded its presentation of evidence and rested its case?

3. Where, without sanction of statute or rule of court providing therefor, an attorney is denied the normal and regular statutory discovery procedures available to all other litigants in New York, is such a denial a denial of due process or the equal protection of the laws within the contemplation of the Constitution of the United States as will render the proceeding a nullity or will cause this Court to invoke its broad powers to correct such a denial so as to make such discovery procedures available in aid of the attorney's defense?

Constitutional Provision Involved

The provision of the Constitution of the United States involved herein is the 14th amendment, the pertinent provision of which is as follows:

> "Section 1 • • • nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

New York Civil Practice Laws and Rules:

"§105. Definitions.

• • • • •

(b) Action and special proceeding. The word 'action' includes a special proceeding; the words 'plaintiff' and 'defendant' include the petitioner and the respondent, respectively, in a special proceeding; and the words 'summons' and 'complaint' include the notice of petition and the petition, respectively, in a special proceeding."

"§3101. Scope of disclosure.

(a) Generally. There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or inform as to afford reasonable grounds of belief that he will not be able to attend the trial; and

(4) Any person where the court on motion determines that there are adequate special circumstances."

New York Judiciary Law:

§90. Admission to and removal from practice by appellate division.

• • • • •

"2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is

guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

* * * * *

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges. * * *"

Statement

Petitioner here is a respondent in a disciplinary proceeding and is charged with a number of ethical violations (A 28a-45a). Respondents here presented their evidence against petitioner and then rested their case (A 13a-14a).

At the conclusion of respondents' case, and in response to petitioner's demand, respondents' trial counsel conceded that respondents were in possession of evidence (sworn testimony and statements) of witnesses who had not been called and refused to disclose to petitioner the statements made by such witnesses (A 13a-16a). There is no dispute that the witnesses who were not called are persons who were directly involved in the very events from which the charges against petitioner stem (A 12a-14a).

Respondents have taken and maintain the position that they are not required to disclose sworn statements or testimony given *in camera* (and in the absence of petitioner or his counsel) if they do not produce such witnesses on the stand.

As a result of the refusal of the courts of New York to grant petitioner any relief from the refusal of respondents to produce, respondent has been compelled to proceed to his defense with *available* evidence denied to him in aid of his defense.[4]

Reasons for Allowance of the Writ

The sense of fairness which is the essence of due process is offended when evidence in aid of a defense is admittedly available and is withheld by a prosecutor. A disciplinary proceeding, directed as it is against an officer of the court, which, if successfully prosecuted, results in public disgrace and the loss of a valuable and honorable privilege, is as much a prosecution as any criminal proceeding.

Respondents here have prosecuted the petitioner, have presented all the evidence they wished to present and have

4. Respondent's defense has now been concluded and the Referee's report is being awaited.

rested. They admit they are in possession of sworn statements given by witnesses directly involved in the issues at bar, but refuse to divulge those statements because they have not called the witnesses who gave them.[5]

This Court has within the past few years expressed itself forcefully on the requirement of disclosure as a necessary element of due process.

> *Brady* v. *State of Maryland,* 373 U. S. 83, 87, 83 S. Ct. 1194;
>
> *Smith* v. *Pennsylvania,* 376 U. S. 354, 84 S. Ct. 763.

It is basically unfair to prosecute a lawyer and attempt to disbar him while withholding evidence which may aid his defense or exonerate him.[6]

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5. In New York the sworn testimony of a witness given in the course of the investigation which precedes a disciplinary proceeding is admissible in the course of the disciplinary proceeding itself if the witness has died before being called. The referee ruled such testimony admissible and the Appellate Division refused to set aside such ruling. The Court of Appeals dismissed the appeal. *Matter of Meacham,* A.D. 2d, leave to appeal denied 5 N. Y. 2d 985. Presumably the same rule would obtain when a witness disappears before being called. In the case at bar counsel for respondent made a somewhat vague statement that one of the uncalled witnesses has returned to Puerto Rico, but offered no proof as to why the uncalled witnesses could not appear (A 12a-13a).

6. Although the petitioner's case has not as yet been concluded, the jurisdiction of this Court is invoked on the authority of *NAACP* v. *Alabama,* 357 U. S. 449, 457-458, 78 S. Ct. 1163, 1169, 2 L. Ed. 2d 1488 and *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 68, 68 S. Ct. 972, 976, 92 L. Ed. 1212. The Court's attention is also respectfully referred to *Harris Truck Lines* v. *Cherry Meat Packers,* 371 U. S. 215, 83 S. Ct. 283; *Thompson* v. *Immigration and Naturalization Service,* 375 U. S. 384, 84 S. Ct. 397; and, *Wolfsohn* v. *Hankin,* 375 U. S. 203, 84 S. Ct. 699, not so much for the specific holdings therein as for circumstances under which this Court took jurisdiction.

The Court has held that an applicant for admission to the bar is entitled to due process.

Willner v. *Committee on Character and Fitness*, 373 U. S. 96, 83 S. Ct. 1175.

Reason would seem to dictate that due process must also be available to an attorney who defends against an attempt to disbar him.

New York's Civil Practice Law and Rules, section 3101, requires full disclosure in every civil action. "Action", as defined by New York Civil Practice Law and Rules, section 105, includes a "special proceeding" and *Matter of Mathot*, 222 N. Y. 8, has held that a disciplinary proceeding is a "special proceeding" and governed by the rules of civil procedure.

To withhold evidence and refuse to make it available to petitioner not only offends that sense of fairness heretofore alluded to, but also denies petitioner the use and hence the equal protection of the very statutory provisions in New York which require the full disclosure which petitioner has thus far vainly sought.

An injustice is being committed and the protection of this honorable Court is sought lest attorneys, as a class, be deprived of the procedural safeguards available to the lowliest criminal.

That the proceeding at bar is not yet concluded in no way mitigates against relief at this time. In New York discipline, once meted out, is published to the profession and the public and subsequent appeals, even if successful, do not wipe out the harm that is done by such publication. Even though petitioner may be successful with his defense as it now stands and limited though it has been by the refusal to disclose, the denial of due process is no

less because he has been thus far required to risk his future on something less than the full defense which complete disclosure will make available to him.

In a government of law such as ours which is dedicated to upholding the dignity of men in the free exercise of their civil rights, lawyers are a special class. Theirs is the task of securing and protecting those rights, and to achieve and maintain the privilege of doing so they must function under rigid ethical standards. When a lawyer is charged with having failed in his ethical duty and faces disbarment, it seems only fair to accord him the same civil rights as are made available to the lowliest of his clients. Anything less strikes at the heart of our philosophy of government.

CONCLUSION

Sound public policy requires this honorable Court to note jurisdiction and grant the writ sought lest an injustice be permitted to continue.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioner.

APPENDIX

After the appointment of the Referee and prior to the commencement of the hearings before the Referee, th petitioner moved pursuant to the provisions of the Civil Practice Law and Rules in the Appellate Division, First Department, for an order granting him a discovery and inspection preliminary to trial. That motion was denied on October 3, 1963 (said order was not officially published). No opinion was written. Thereafter, on October 25, 1963, the petitioner timely moved for reargument before the Appellate Division, or in the alternative, for leave to appeal to the Court of Appeals. That motion was denied in its entirety without opinion by order dated November 19, 1963. (There was no publication of this order.) Thereafter, petitioner here timely moved before the Court of Appeals of the State of New York for leave to appeal to that Court. By order dated January 19, 1964, the Court of Appeals dismissed that motion, without opinion; see 13 N. Y. 2d 1119. Thereafter, petitioner below sought a writ of certiorari in this Court which writ was denied by this Court in 377 U. S. 933, S. C.

Order of Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twentieth day of May, A.D. 1965.

Present, Hon. CHARLES S. DESMOND, Chief Judge, presiding.

In the Matter of

Anonymous (No. 1), An Attorney,

Appellant,

The Coordinating Committee on Discipline,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A Copy

GEARON KIMBALL
Deputy Clerk

Order of Court of Appeals Denying Leave to Appeal

SIR:

PLEASE TAKE NOTICE that an order of which the within is a copy was duly entered herein and filed with the Clerk of the Court of Appeals on the 20th day of May, 1965.

Dated: New York, June 1, 1965

ANGELO T. COMETA
Counsel to the Committee
100 Centre Street
Room 1535
New York, N. Y.

To:

Leonard Feldman, Esq.
350 Fifth Avenue
New York, N. Y.

Order of March 18, 1965 Denying Motion to Produce

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 18th day of March, 1965.

Present—Hon. CHARLES D. BREITEL, Justice Presiding
" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER, Justices

[SAME TITLE]

The above-named respondent having moved this Court for an order directing the petitioner, Co-ordinating Committee on Discipline, to disclose to the respondent in this proceeding all statements, testimony or documents relating thereto in the possession of said petitioner and by whomsoever made and relating to Irving Dansker, Bert J. Sapot or the respondent which have not already been disclosed to respondent; and for other relief,

Now, upon reading and filing the order to show cause, dated February 15, 1965, with proof of due service thereof, and the affidavit of Leonard Feldman, duly sworn to the 15th day of February, 1965, and the exhibits annexed thereto, in support of said motion, and the affidavit of Angelo T. Cometa, duly sworn to the 25th day of February, 1965, and the exhibits annexed thereto, in opposition thereto, and after hearing Mr. Leonard Feldman for the motion, and Mr. Angelo T. Cometa opposed,

It is ordered that the said motion be and the same hereby is denied in all respects.

ENTER:

VINCENT A. MASSI
Clerk.

Order to Show Cause and Affidavit in Support of Motion to Disclose

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

Upon reading the affidavit of Leonard Feldman, sworn to February 15, 1965, and on all the proceedings heretofore had herein, let the petitioners in the above proceeding show cause at a term for motions held at this Court, Madison Avenue and 25th Street, New York, New York, on the 19th day of February, 1965, at 1 P.M. on that day or as soon thereafter as counsel can be heard, why an order should not be made directing the said petitioners to disclose to the respondent in this proceeding all statements, testimony or documents relating thereto in the possession of said petitioners and by whomsoever made and relating to Irving Dansker, Bert J. Sapot or the respondent which have not already been disclosed to respondent and granting to respondent such other and further relief as to this Court may seem just and proper.

Sufficient cause appearing therefor, let service of a copy of this order and the papers upon which it was granted on petitioners counsel on or before 5 P.M. February 15, 1965, be deemed good and sufficient thereof; petitioner to serve and file papers in opposition by noon on February 19, 1965.

Dated: February 15th, 1965

/s/ FRANCIS L. VALENTE
Justice of the Supreme Court of the State of New York: Appellate Division, First Department.

Affidavit of Leonard Feldman in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD FELDMAN being duly sworn, deposes and says:

I am the attorney for the respondent in the above entitled proceeding and make this affidavit in support of the respondent's affidavit for an order directing the petitioners to disclose to the respondent all testimony, statements, memoranda of statements, and documents relating thereto given by persons who appeared before the petitioners in the course of their inquiry into the affairs of the respondent or of Irving Dansker and Bert J. Sapot, and which persons were not called as witnesses in behalf of the petitioners during the presentation of the petitioners' case.

No prior application for this relief has heretofore been made, except as is hereinafter set forth.

This motion is being brought on by order to show cause because the hearings are presently in progress and the Referee has directed that it be brought on as rapidly as feasible. The Referee has adjourned the hearings until March 3, 1965 subject, however, to this proceeding and the outcome thereof.

Affidavit of Leonard Feldman in Support of Motion

The Circumstances Leading Up to the Respondent's Demand

In essence, the respondent stands accused of having engaged in and furthered a conspiracy with two lawyers (since disbarred), Irving Dansker and Bert J. Sapot, to develop and promote the solicitation of negligence cases through the use of tow car operators, body shops, etc., with Dansker and Sapot to act under the direction and control of the respondent. The cases so solicited, it is charged, were to be exclusively referred to the respondent. An equally serious charge is that in the furtherance of that conspiracy and in the course thereof, the respondent knowingly participated in a fraud involving the substitution of a "ringer" as a stand-in for a claimant, Antonio Padilla, in a personal injury case—the stand-in being used to participate in the physical examination conducted by the insurance carrier's physician in place of the then disappeared claimant. The stand-in was one Rosario Cruz, or Rosario Cruz-Melendez. A third charge relates to the alleged efforts of the respondent to induce an attorney to enter into a similar "chasing" operation—said attorney being Ira J. Raab. There are other charges involved in the proceeding but they are not material to this application.

The background of this proceeding is important and should be before the Court.

In 1958, when, petitioners charge, the alleged conspiracy between the respondent and Dansker and Sapot is alleged to have begun, Dansker and Sapot were engaged in the practice of law in an office on Second Avenue in East Harlem. The respondent, whose office was in lower Manhattan, was a partner of a highly respected law firm

whose principal activity was serving as trial counsel to other lawyers in the personal injury field. Irving Dansker had been a clerk and later a lawyer in the office of respondent's then law firm, and after he left, in 1958, he went into a law partnership known as Dansker & Sapot—his partner being Bert J. Sapot. The firm of Dansker & Sapot, after it had been in existence for some time, began to retain the respondent's law firm as counsel in cases where Dansker & Sapot were the attorneys of record. It is charged by the petitioners that those referrals were made in the course of and as a result of the conspiracy charged in the petition.

The petitioners claim that Dansker and Sapot engaged in the improper use of tow car operators and auto body shops and other persons to solicit the cases which they referred to the respondent's law firm in the course of the conspiracy of which the respondent was a part.

In 1959, the respondent and his then partner dissolved their partnership and each continued as individual practitioners. The firm of Dansker & Sapot continued to refer cases to the respondent. It is not claimed by petitioners that the dissolution was in any way connected with the charged conspiracy or its operations.

Although the petitioners charge that the respondent was the attorney to whom Dansker & Sapot exclusively referred personal injury cases, it developed in the petitioners' case that during this period of alleged exclusivity, Dansker & Sapot were also referring cases to Ira J. Raab and did so in huge volume. In a period of about one year they referred some 99 matters to Mr. Raab, 75 of which were personal injury cases.

Affidavit of Leonard Feldman in Support of Motion

In the Summer of 1960, the District Attorney of Queens County launched an inquiry into tow car operations involving police payoffs, the improper referral of attorneys, and the like. That investigation was heralded in the press, and as a result of it similar investigations were instituted at or about the same time or shortly thereafter, in Bronx and New York Counties.

It developed in the course of the petitioners' case that during the Fall of 1960 Bert J. Sapot, disguising himself as an anonymous informant, communicated with the New York Journal-American and disclosed the nature of his operation to reporters of that newspaper. As reported in the Journal-American, Mr. Sapot, under the guise of anonymity, called the Journal-American on November 14, 1960, stating: "Are you interested in a major scandal involving attorneys, doctors, insurance adjusters and tow car operators?"

The call had been made to Mr. James D. Horan, Special Events Editor of the New York Journal-American and, according to the press report, Mr. Horan replied: "We certainly are. When can we meet?"

Mr. Sapot replied: "Meet me in front of Nathan Hale's statue in City Hall Park in a half hour and be prepared to listen for several hours."

The Journal-American apparently immediately advised the New York District Attorney's Office, and thereafter its conversations with Mr. Sapot, although Mr. Sapot still maintained anonymity and refused to identify himself, were carried on with the knowledge of the District Attorney's Office and the detectives assigned to that office. The Assistant District Attorney who supervised the investigation was then Assistant District Attorney Angelo Cometa.

At the hearings, Mr. Sapot admitted the foregoing conduct although he questioned some of the details. He stated that he made his anonymous disclosures without the knowledge of his partner, Irving Dansker, and he also admitted that his motivation was to avoid a jail sentence for himself, for, in the course of his disclosures, he had revealed the fraud involved in the stand-in situation previously referred to, and also to the fact that he or his partner, Irving Dansker, had forged the name of the claimant in that case to the settlement check received from the insurance carrier.

The District Attorney's Office, in addition to its generalized tow car investigation, instituted an immediate full scale investigation into the matters disclosed by Mr. Sapot, *and the respondent was one of the individuals investigated by the District Attorney's Office.*

Ultimately both Dansker and Sapot fled the jurisdiction. They later returned under the urgings of their counsel, and made a full disclosure to the District Attorney's Office. As a result of that disclosure they were indicted for their various crimes, and a copy of that indictment is annexed hereto and made a part hereof. The indictment was dated February 7, 1961.

It is significant to note at this point that the investigation of the District Attorney into the affairs of Dansker & Sapot and of the respondent had been going on since at least November, 1960, and encompassed the disclosures made by the various persons connected with the Dansker and Sapot operations who were involved as a result of that investigation.

The indictment, as is seen from its mere reading, is complete and names as co-conspirators in the Dansker and

Sapot operations, Frank Kopec, John D'Erasmo, John Ortiz, Placido Milone, Vincent Maggio, Frank Fighera, John Paul Kelly, Arturo Gonzalez.

The respondent was never indicted or even named as a conspirator by the indictment, although the existence of the respondent was known to the District Attorney and the respondent's operations had also been the subject of investigation by the District Attorney.

Following their indictment, Dansker and Sapot continued their cooperation with the District Attorney's Office (this was admitted by Mr. Sapot on the stand in the course of the present hearings) and also began to make disclosures to the Coordinating Committee on Discipline.

On June 28, 1961, Dansker and Sapot pleaded guilty to a lesser crime and on sentencing in July, 1961, received a suspended sentence and were placed on probation on condition of their continued cooperation with the Co-ordinating Committee. Their plea and sentence followed their appearance before the Co-ordinating Committee.

Among other witnesses also heard by the Co-ordinating Committee were Frank Kopec, Vincent Maggio and Morris Spring—the first two named being tow car drivers and Mr. Spring being a tow car driver and body shop operator. All three were produced as petitioners' witnesses at the hearings and Mr. Maggio and Mr. Spring admitted that they also had been interrogated by the District Attorney —Mr. Maggio admitted to some six such interrogation sessions, and Mr. Spring admitted to at least one. *Mr. Spring and Mr. Maggio admitted that they did not mention the respondent to the District Attorney.*

Curiously, though Kopec and Maggio were charged by the District Attorney and pleaded guilty to their involve-

ment in Dansker and Sapot's operations, Spring was never indicted. Equally as curious was the fact that at the hearings before the Referee, though Spring readily and openly admitted his involvement with Dansker and Sapot, he repeatedly asserted his privilege and refused to testify to his involvement with others.

Mr. Kopec who, according to the petitioners, had attended a meeting with Maggio, Spring, Dansker, Sapot, Lawrence Holt and others, at which the respondent was allegedly present and introduced as the man involved in the operations of Dansker and Sapot, and the person to whom Mr. Kopec and others should refer their cases because Dansker and Sapot were allegedly leaving the "business", could neither identify the respondent nor recall any such meeting.

In the course of the Co-ordinating Committee's investigation, the Committee heard testimony or interviewed many persons in addition to those whom they produced at the hearings before the Referee. Among the persons whom they interrogated was Lawrence Holt, who allegedly attended the meeting above referred to, and either Benjamin Cruz or Antonio Padilla—the persons involved in the fraud charge. Neither Mr. Holt, Mr. Padilla or Mr. Cruz were produced at the hearings as witnesses. No explanation was offered as to the failure to produce Mr. Holt. Concerning Mr. Cruz, petitioners' trial counsel made the following statement:

> "Mr. Fitzpatrick: If your Honor, please, at this time may I state that I did not call as witnesses Antonio Padilla and Benjamin Cruz Melendez who are mentioned in Charge 6 because Padilla could

not be located and Melendez is believed to be somewhere in Puerto Rico.

The Referee: Melendez? I don't see any Melendez. You are talking about Charge No. 9?

Mr. Fitzpatrick: Talking about Charge No. 6, your Honor.

The Referee: Charge No. 6. What do you want to do with Charge No. 6?

Mr. Fitzpatrick: I am merely stating for the record that I did not call Antonio Padilla because I couldn't locate him, and as far as I can learn, the witness Melendez couldn't be produced because he is somewhere in Puerto Rico." (s.m. 2168-2169).

* * * * *

"The Referee: * * * I have heard your statement, Mr. Fitzpatrick. It is not proof.

Mr. Fitzpatrick: I realize that I am just giving an explanation as best I can." (2169).

Following the foregoing statement, the following colloquy ensued:

"The Referee: We are now turning to the respondent's case. You have a request to make, Mr. Feldman?

Mr. Feldman: Yes, I do. At this time I would like to ask the petitioner to concede that there were witnesses interviewed by the petitioner other than those who were produced on the petitioner's case before your Honor.

Mr. Fitzpatrick: I'll concede that.

The Referee: All right, please go a little slower. I would like to make notes on these.

All right, Mr. Feldman.

> Mr. Feldman: In view of the petitioner's concession just made, I would ask the petitioner to turn over to the respondent's counsel all statements, all testimony if there be such, and all documentary evidence relating thereto now in the possession of the petitioner concerning persons who did appear before the petitioner or appeared before any other agency or officer, and who were not called here as witnesses.
>
> Mr. Fitzpatrick: If your Honor please, I would like to consult with my office before answering that request. At the moment, may I say I don't think counsel is entitled to what he is requesting and I should like time for further consultation." (2174-2175)*

There then ensued a colloquy between court and counsel as to whether the Referee had the authority to order the petitioners to produce the material demanded. During the course of that colloquy there was revealed to the Referee the facts of a prior application (the details of which will be set forth in this affidavit at a later point). The Referee then made the following ruling in anticipation of the petitioners' refusal to disclose.

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* Where petitioners did produce witnesses who had also appeared before petitioners *ex parte* petitioners' counsel did produce and disclose the testimony or statements given *ex parte* by such witnesses. Such disclosures did not include statements or testimony, if any, given to the District Attorney.

A subpoena duces tecum was served on the District Attorney February 4, 1965. Although the District Attorney appeared in response thereto, he asked for further time to search his records and it is not known at this juncture whether the District Attorney will produce his records or take some other position with regard thereto.

"The Referee: Then I must say at this time, Mr. Feldman, I have thought about it, I think sufficiently for me to make what I consider is an intelligent determination. It is my determination that in view of your disclosure of the application to the Appellate Division that I have no power to entertain the application on the merits at all. I realize your concern in seeing this testimony because you believe that you need it to properly present your client's case. I am willing to give you a reasonable time before you have to commence the respondent's case to make an application to the Appellate Division at this time if you so desire.

Mr. Feldman: I intend to, your Honor.

The Referee: I cannot pass the threshold question of authority.

Mr. Feldman: Your Honor, I intend to make that application.

The Referee: Frankly, I don't see that I can accurately come to any other conclusion than what I have just stated. I don't think I have any alternative choice.

Mr. Feldman: Your Honor, so that it cannot be said—

The Referee: How much time will you require, if you want to go into the respondent's case, so that you will have a reasonable opportunity to make such an application to the Appellate Division if you are so advised.

(Discussion off the record.)

The Referee: I am sure if you decide to make such an application, you will not prolong it.

Mr. Feldman: That is right, I will not bring it on by long notice motion or anything of the sort." (2194-2195).

The Referee then fixed February 10, 1965 as the date by which the petitioners were to advise counsel for the respondent as to whether the demanded disclosure would be made.

Prior to February 10, 1965, petitioners' counsel advised your deponent that such a disclosure would not be made. On February 10, 1965, petitioners' counsel formally stated on the record the refusal of petitioners to make the disclosure demanded. The Referee then adhered to his ruling and adjourned the hearings to permit the instant application to be made.

THE PRIOR PROCEEDINGS

After the present proceeding against the respondent was instituted, but *before the hearings commenced,* the respondent moved before this Court for an order granting a discovery and inspection of all of the financial records of Bert J. Sapot and Irving Dansker; granting a discovery and inspection of all of the testimony and all of the statements and exhibits in the possession of the petitioners with regard to the instant proceeding, or in the alternative, to dismiss the petition. By order dated October 3, 1963, that motion was in all respects denied and there was no opinion by this Court.

Thereafter, the respondent moved for leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals from the order of October 3, 1963. By order dated November 19, 1963, that motion was in all respects denied.

Affidavit of Leonard Feldman in Support of Motion

Thereafter, the respondent moved in the Court of Appeals for leave to appeal from the order of October 3, 1963, and on motion of the petitioners the motion for leave to appeal was dismissed by order of the Court of Appeals on January 9, 1964 on the ground that the order sought to be appealed from did not finally determine the proceeding within the meaning of the Constitution of the State of New York.

There were no opinions in any court.

As is seen from the Referee's remarks heretofore quoted, the Referee felt that the fact that the foregoing discovery application had been made to this Court prior to the hearings, that he had no authority to pass upon the question, but that the pending application had to be referred to this Court.

It is the respondent's position that the order of October 3, 1963, was not dispositive of the issue presently before this Court. The motion for a discovery and inspection which led to the order of October 3, 1963 was in the nature of a request for anticipatory relief. It was designed to help the respondent prepare his defense in anticipation of what the petitioners might produce.

As a matter of fact, in opposing the respondent's prior motion, the petitioners took the position that they would make full disclosure in the course of the hearings.

The opposing affidavit of Mr. Henry Weiner, then counsel to the petitioners dated September 5, 1963, categorically stated, in part, as follows:

> "Petitioners follow the rule laid down by the Court of Appeals in People *v.* Rosario, 9 N. Y. 2d 286, which provides that when a witness for petitioners completes his testimony at the trial upon

direct examination, a copy of the transcript of his testimony in the preliminary inquiry will then be delivered to respondent upon request, so that it may be used to point out any inconsistencies which may exist in the testimony given by the witness or for any other legitimate purpose."

The impression was conveyed that petitioners would make a full disclosure in the course of the hearings before the Referee.

This Court, in denying the motion when it did, could very well have reasoned that it would be wiser to await the hearings to determine whether the respondent would not, in fact, get all the prior testimony and statements and other documents during the course of the hearings themselves and thus have all of the evidence available for use by him in the course of his defense.

The petitioners' case is now concluded and it is clear on petitioners' concession and on the facts that there were witnesses heard or interviewed by the petitioners who were not produced as witnesses at the hearings. It may properly be reasoned that petitioners' failure to produce such witnesses was inspired, in part, by the knowledge that if such witnesses or their statements in petitioners' possession were produced their testimony or their prior statements would not be helpful to the petitioners' case. Whether helpful or not, however, it is irrefutably clear that there are documents, statements or testimony in the possession of petitioners which might not only materially aid the respondent's defense, but might also be of substantial significance on the issue of discipline of the respondent by this Court.

Affidavit of Leonard Feldman in Support of Motion

The position of the respondent is materially different from that at the time of the prior motion. Whereas the prior motion had been made at a time when no one could foretell whether a full disclosure was not going to be made by petitioners, it now is clear that evidence whether favorable or not is in existence and is being withheld by petitioners.

It is respectfully submitted that the instant motion is materially and substantially different from the prior motion and the decision of this Court in the preliminary motion is not dispositive of the issue now before this Court.

THE JUSTIFICATION FOR THE ORDER WHICH THE RESPONDENT NOW SEEKS

As will be seen from the brief which will be submitted in behalf of the respondent on the return of this motion, a fundamental and vital issue of due process is now at hand. The petitioners are in possession of and refuse to disclose statements or testimony relating directly to the charges in issue. In the case of Holt, Padilla and Melendez, that testimony is vital for these are persons who are directly involved in the charges.

The Court's attention is also directed to the fact that the indictment of Dansker and Sapot names persons, all or some of whom were called before the petitioners to give testimony, and their testimony again may contain statements or leads which would be vital to the respondent's defense.

Dansker and Sapot named many people as being involved in the conspiracy with the respondent. At this juncture the testimony which Dansker and Sapot gave

at the hearings is subject to great scrutiny, not only because of its source, but because other witnesses produced at the hearings have refuted substantial elements of their testimony. Dates are different, places are different, events are different.

The statements which are now being withheld may disclose still greater discrepancies or, perhaps, direct refutations. Whether these statements which the petitioners now refuse to disclose do contain direct refutations or further inconsistencies, is of no moment on this application. The important issue is that the respondent is being deprived of the right to have every shred of available information disclosed to him for whatever benefit it may be to his defense. The casual remark of a witness before the Co-ordinating Committee could lead to a disclosure of evidence which would irrefutably establish that the respondent is completely innocent of the charges, as he avers, or the victim of a conspiracy to purchase freedom from jail for Dansker and Sapot—a conspiracy which was engineered by or on behalf of Dansker and Sapot when they were faced with the inevitable fruits of their crime. It is literally incredible that after hearing witness after witness and with the investigative facilities of the police department available to him, the District Attorney did move to indict Dansker and Sapot, but did not move to indict the respondent or even name the respondent as a co-conspirator in the very same conspiracy with which he is now charged, and yet petitioners now charge respondent with direct involvement in that conspiracy after hearing the very same witnesses. If ever there was a case which demanded full disclosure, this is one.

Certainly this Court has every reason to infer that which your deponent believes to be the actual fact and that is that the petitioners had available to them all of the information compiled by the District Attorney's staff with regard to the involvement of Dansker and Sapot and the respondent. As a matter of fact, Dansker and Sapot when they were being sentenced, informed the sentencing court that they were cooperating with the petitioners, and it hardly seems likely that the District Attorney was not similarly cooperating, as well he would have been expected to do.

It is respectfully submitted that unless the petitioners are ordered to disclose all statements, documentary evidence and testimony in their possession, that a fundamental denial of due process will be permitted to continue which will irrevocably taint this proceeding and render it a nullity. The respondent is entitled to the fullest opportunity to make his defense and to make it as completely as he possibly can. The respondent is entitled to the full and complete cooperation of the petitioners in his efforts to defend himself. Anything less than that is a denial of due process.

The following colloquy presents the heart of the issue.

> "Mr. Feldman: Your Honor, I would like preliminarily to state the issue which I have raised before you is an issue both under the federal and under our own state constitution. I believe it to be the law of this state as well as of the United States that the people have no interest in convicting innocent people or disbarring innocent lawyers—
>
> The Referee: No doubt about that in my mind.

Affidavit of Leonard Feldman in Support of Motion

Mr. Feldman: —and that any evidence which would adduce the truth in a given proceeding should be disclosed before the court.

The Referee: I agree with you. I don't think the people have any vested interest in sending people to jail or punishing them. The people have an interest in preserving law and order and ascertaining the truth and in processes of preserving law and order."

For the reasons hereinbefore set forth, the motion to compel the petitioners to disclose all statements, testimony or documents in their possession given by or relating to persons who appeared before petitioners or their staff and who were not called as witnesses by the petitioners in the course of presentation of petitioners' case should be granted.

LEONARD FELDMAN

(Sworn to on February 15, 1965.)

Grand Jury Indictment

ATC:HED

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

[SAME TITLE]

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the above named defendants of the crime of Grand Larceny in the First Degree, committed as follows:

The defendants, in the County of New York, on or about April 18, 1960, with the intent to deprive and defraud another of property and of the use and benefit thereof, and to appropriate the same to their own use, and to the use of someone other than the true owner, stole from the Travelers Insurance Company the sum of $3,000, to wit, one bank check, the property of said Travelers Insurance Company.

The said theft was effected by means of the following representations made to the said Travelers Insurance Company: that the claimant in a personal injury action, one Antonio Padilla, had undergone a physical examination by an insurance doctor; that the said Antonio Padilla executed a general release on April 13, 1960 and that the signature on a general release executed on April 13, 1960 was the true and valid signature of the said Antonio Padilla.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accurse the said defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

Grand Jury Indictment

The defendants, in the County of New York, on or about April 18, 1960, having in their custody a certain instrument and writing of which the following is a copy:

Photostatic Copy of Travelers Insurance Company Bank Check for $3,000

(See Opposite) ☞

No. 6081172

The Travelers

THE TRAVELERS INSURANCE COMPANY • THE TRAVELERS INDEMNITY COMPANY • THE CHARTER OAK FIRE INSURANCE COMPANY

DATE	CLAIM NO.	DATE OF LOSS	INSURED	RE	POL. FORM & DIV.
4/18/60	891S1573	1/11/60	Juan Padilla	A. Padilla	

POL. YEAR	BALANCE REV. PREM.	STATE	LINE OF INS.	KIND OF PAYMENT	F. OR A.	MISCELLANEOUS
59	80 J	NY	QMV BI	CLAIM	F	

FOR

PAY ONLY ▶ $3000.00

AT SIGHT PAY TO THE ORDER OF

Antonio Padilla and
Bert Sapot, Atty.
320 Broadway
N.Y.C.

kt

To Office Manager, THE TRAVELERS INSURANCE COMPANY
80 John Street, New York, N. Y.

1-23
210

Payable Through
MORGAN GUARANTY TRUST COMPANY OF NEW YORK
New York, N. Y.

Authorized Signature

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thereafter and on or about April 18, 1960, in the County of New York aforesaid, with intent to defraud, forged on the back of said instrument and writing a certain endorsement, of which the following is a copy:

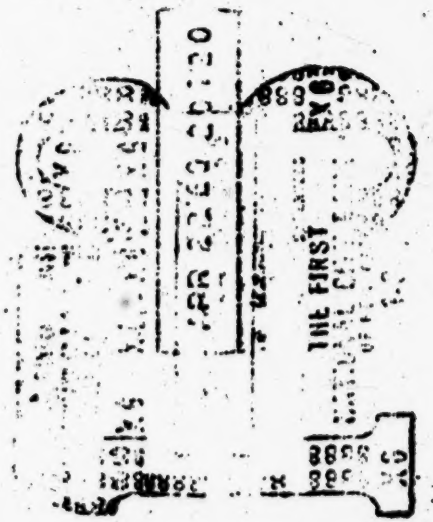
Photostatic Copy of Endorsement of Rear of Travelers Insurance Company Bank Check for $3,000

(See Opposite) ☞

Endorsement must agree in every respect with payee's name (names) shown on the face of this draft.

First Sapot, atty

PAY TO THE ORDER OF
THE FIRST NATIONAL CITY BANK OF NEW YORK
116th STREET BRANCH
DANSKER & SAPOT
Attorneys At Law, Special
#411-5358



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JAN 27 1961

Grand Jury Indictment

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

Said defendants, in the County of New York, on or about April 18, 1960, with intent to defraud, uttered, offered, disposed of and put off as true, and had in their possession, with intent so to do, the same instrument and writing set forth in the second count of this indictment, on the back of which said instrument and writing there was then the forged endorsement set forth in the second count of this indictment, to which reference is hereby made, said defendants then knowing the same to be forged.

To all to whom these Presents shall come
or may Concern,

Greeting: Know Ye, That I Antonio Padilla, residing at 996 Tiffany Street, Bronx, New York, being over the age of 21 years and a citizen of the United States, for and in consideration of the sum of Three Thousand Dollars ($3,000) lawful money of the United States of America to me in hand paid by Juan Badillo the receipt whereof is hereby acknowledged, have remised, released, and forever discharged and by these presents do for myself, my heirs, executors, and administrators and assigns, remise, release and forever discharge the said Juan Badillo, his heirs, executors, administrators, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, special-

ties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against him, I ever had, now have or which I or my heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

This release may not be changed orally.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 13th day of April in the year one thousand nine hundred and sixty.

Sealed and delivered in the presence of

ANTONIO PADILLA L.S.
Antonio Padilla

FOURTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Forgery in the Second Degree, committed as follows:

The defendants, in the County of New York, on or about April 13, 1960, with intent to defraud, forged an instrument and writing, said instrument being an instrument, document and writing, being and purporting to be the act of another by which a pecuniary demand and obligation was and purported to be and to have been created, increased, discharged and diminished and in other manner affected, and by which rights and property were and purported to be and to have been created, trans-

ferred, conveyed, discharged, increased and diminished and in other manner affected, to wit, a general release, of which the following is a copy:

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Forgery in the Second Degree, committed as follows:

Said defendants, in the County of New York, on or about April 13, 1960, with intent to defraud, uttered, offered, disposed of and put off as true, and had in their possession with intent so to do, the forged instrument, writing and general release set forth in the fourth count of this indictment, the defendants then knowing the same to be forged.

SIXTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Conspiracy, committed as follows:

The defendants, between on or about June 1, 1959 to on or about July 30, 1960, in the County of New York, unlawfully and corruptly conspired with Frank Kopec, John D'Erasmo, John Ortiz, Placido Milone, Vincent Maggio, Frank Fighera, John Paul Kelly, Arturo Gonzalez and others to commit crimes, to wit, to violate sections 270-a and 270-d of the Penal Law, and to commit acts for the perversion and obstruction of justice and of the due administration of the laws.

During the entire period of the conspiracy, the defendants were attorneys and counsellors-at-law and, at various

times during the period of the said conspiracy, the said Kopec, D'Erasmo, Ortiz, Milone, Maggio and Fighera, all laymen, were employed as operators of tow trucks in the City of New York. In this capacity, the said Kopec, D'Erasmo, Ortiz, Milone, Maggio and Fighera were regularly in contact with persons involved in automobile accidents, many of which accidents resulted in personal injuries to parties involved.

During the period of the said conspiracy, the said Kelly and Gonzalez were not engaged in the towing business, but operated as independent agents for the said defendants.

It was part of said conspiracy that in learning of automobile accidents, resulting in property damage and in personal injuries, the said Kopec, D'Erasmo, Ortiz, Milone, Maggio, Fighera, Kelly and Gonzalez would ascertain the extent of the property damage and personal injuries, and the extent of insurance coverage, if any.

It was further part of said conspiracy that in such cases the said Kopec, D'Erasmo, Ortiz, Milone, Maggio, Fighera, Kelly and Gonzalez would, acting on behalf of said defendants, solicit and procure through solicitation for the defendants, directly and indirectly, the legal business of such accident victims in connection with any negligence suit or any other suit that might arise out of such accidents and solicit and procure through solicitation for said defendants retainers, written or oral, agreements authorizing said defendants to perform and render legal services.

It was further part of said conspiracy that the said Kopec, D'Erasmo, Ortiz, Milone, Maggio, Fighera, Kelly and Gonzalez, in learning of automobile accidents, would act as employees of said defendants for the purpose of soliciting, aiding, and abetting the defendants in the solici-

tation of legal business and the procurement through solicitation, directly and indirectly of retainers, written and oral, and of agreements authorizing the defendants to perform and render legal services.

It was further part of said conspiracy that the defendants would pay said Kopec, D'Erasmo, Ortiz, Milone, Maggio, Fighera, Kelly and Gonzalez either a fixed sum arrived at by agreement, or a fixed percentage of the fee received by the defendants, as attorneys, when the case was ultimately disposed of by suit, settlement or otherwise.

OVERT ACTS

In furtherance of the conspiracy, and during its course, and to effect the objects thereof, the defendants and the said Kopec, D'Erasmo, Ortiz, Milone, Maggio, Fighera, Kelly and Gonzalez committed the following overt acts in the County of New York.

1. During the month of June, 1959, the said John Paul Kelly had a conversation with the said defendant, Bert Sapot.

2. During the month of June, 1959, the said Sapot visited a certain Bulah Martin at 3750 Third Avenue.

3. On or about October 31, 1959, the said Frank Kopec had a conversation with one Andrea Padin and a certain George Planas.

4. On or about October 31, 1959, the said defendant Bert Sapot and the said Kopec visited the said Padin and the said Planas.

5. On or about November 1, 1959, a certain Hermina Varges had a conversation with the said defendant Bert Sapot.

6. On or about February 13, 1960, the said Vincent Maggio had a conversation with the defendants.

7. On or about February 13, 1960, a certain Carlos Matos visited the defendants at the latters' office, then located at 2353 Second Avenue.

8. On or about March 9, 1960, a certain Richard Hogan visited the defendants at the latters' office, then located at 2353 Second Avenue.

9. On or about March 26, 1960, the said Placido Milone had a telephone conversation with the said defendant Bert Sapot.

10. On or about March 26, 1960, the said defendant Bert Sapot had a conversation with one William O'Neill and the said Milone.

11. On or about April 3, 1960, the said Vincent Maggio had a conversation with the said defendant Irving Dansker.

12. On or about April 3, 1960, a certain Bobby Joe Creer had a conversation with the said defendant Irving Dansker at 1752 Park Avenue.

13. On or about April 10, 1960, the said John Ortiz had a conversation with one Fernando Hervas and a certain Waldo Lopez.

14. On or about April 10, 1960, the said Hervas and Lopez had a conversation with the said Ortiz and the defendants at the latters' office at 2353 Second Avenue.

15. On or about May 1, 1960, the said John D'Erasmo had a conversation with the defendants.

Grand Jury Indictment

16. On or about May 1, 1960, a certain Jose Ayala had a conversation with the said defendant Bert Sapot at 321 West 110th Street.

17. On or about May 4, 1960, the said Arturo Gonzalez and the defendant Irving Dansker visited a certain Carmen Perez at the latter's home, 216 East 119th Street.

18. On or about May 5, 1960, the said Carmen Perez visited the said defendant Bert Sapot at the latter's office, 2353 Second Avenue.

19. On or about May 22, 1960, a certain Oswald Perez had a conversation with the said Frank Fighera.

20. On or about May 22, 1960, the said Oswald Perez had a telephone conversation with the said defendant Bert Sapot.

21. On or about June 17, 1960, a certain Alfredo Medina, accompanied by the said Arturo Gonzalez, visited the defendants at their office, 2353 Second Avenue.

22. On or about June 29, 1960, the said Frank Kopec and the said defendant Irving Dansker, visited one Fairley Burke at the latter's home, 523 West 152nd Street.

23. During the month of July, 1960, the said Arturo Gonzalez visited the said defendant Bert Sapot at the latter's office, 2353 Second Avenue.

SEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

Grand Jury Indictment

The defendants, being attorneys and counsellors-at-law, and John Paul Kelly, as agent, employee and a person acting on behalf of the said defendants, during the month of June, 1959, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from one Bulah Martin, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Bulah Martin in connection with injuries sustained by the said Bulah Martin in an accident.

EIGHTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Frank Kopec, as agent, employee and a person acting on behalf of the said defendants, on or about October 31, 1959, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Andres Padin and George Planas, and solicited and procured through solicitation retainers, written and oral, and agreements authorizing the said defendants, as attorneys, to perform and render legal services for and on behalf of the said Andres Padin and George Planas in connection with injuries sustained by the said Andres Padin and the said George Planas in accidents.

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NINTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and said Frank Kopec, as agent, employee and a person acting on behalf of the said defendants, on or about November 1, 1959, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Hermina Varges, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Hermina Varges in connection with injuries sustained by the said Hermina Varges in an accident.

TENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of sections 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Vincent Maggio, as agent, employee and a person acting on behalf of the said defendants, on or about February 13, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Carlos Matos, and solicited and procured through solicitation a retainer, written and oral, and

an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Carlos Matos in connection with injuries sustained by the said Carlos Matos in an accident.

ELEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and said Vincent Maggio, as agent, employee and a person acting on behalf of the said defendants, on or about March 9, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Richard Hogan, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Richard Hogan in connection with injuries sustained by the said Richard Hogan in an accident.

TWELFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Placido Milone, as agent, employee and a person acting on behalf of the said defendants, on or about March

26, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from William O'Neill, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said William O'Neill in connection with injuries sustained by the said William O'Neill in an accident.

THIRTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and said Vincent Maggio, as agent, employee and a person acting on behalf of the said defendants, on or about April 3, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Bobby Joe Creer, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Bobby Joe Creer in connection with injuries sustained by the said Bobby Joe Creer in an accident.

FOURTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

Grand Jury Indictment

The defendants, being attorneys and counsellors-at-law, and John Ortiz, as agent, employee and a person acting on behalf of the said defendants, on or about April 10, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Fernando Hervas and Waldo Lopez, and solicited and procured through solicitation retainers, written and oral, and agreements authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Fernando Hervas and Waldo Lopez in connection with injuries sustained by the said Fernando Hervas and the said Waldo Lopez in accidents.

FIFTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Michael D'Erasmo, as agent, employee and a person acting on behalf of the said defendants, on or about May 1, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Jose Ayala, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Jose Ayala in connection with injuries sustained by the said Jose Ayala in an accident.

SIXTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Arturo Gonzalez, as agent, employee and a person acting on behalf of the said defendants, on or about May 4, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Carmen Perez, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Carmen Perez in connection with injuries sustained by the said Carmen Perez in an accident.

SEVENTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Frank Fighera, as agent, employee and a person acting on behalf of the said defendants, on or about May 22, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Oswald Perez, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defend-

ants, as such attorneys, to perform and render legal services for and on behalf of the said Oswald Perez in connection with injuries sustained by the said Oswald Perez in an accident.

EIGHTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Arturo Gonzalez, as agent, employee and a person acting on behalf of the said defendants, on or about June 17, 1960, in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Alfredo Medina, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Alfredo Medina in connection with injuries sustained by the said Alfredo Medina in an accident.

NINETEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Soliciting Business on Behalf of an Attorney, in violation of section 270-a of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, and Frank Kopec, as agent, employee and a person acting on behalf of the said defendants, on or about June 29, 1960,

in the County of New York, unlawfully solicited and procured through solicitation, directly and indirectly, legal business from Fairley Burke, and solicited and procured through solicitation a retainer, written and oral, and an agreement authorizing the said defendants, as such attorneys, to perform and render legal services for and on behalf of the said Fairley Burke in connection with injuries sustained by the said Fairley Burke in an accident.

TWENTIETH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the crime of Employment by Attorney of Person to Aid, Assist or Abet in the Solicitation of Business or the Procurement Through Solicitation of a Retainer to Perform Legal Service, in violation of section 209-d of the Penal Law, committed as follows:

The defendants, being attorneys and counsellors-at-law, in the County of New York, from on or about June 1, 1959 to on or about July 30, 1960, did unlawfully employ at various times the said Frank Kopec, John D'Erasmo, John Ortiz, Placido Milone, Vincent Maggio, Frank Fighera, John Paul Kelly and Arturo Gonzalez for the purpose of soliciting and aiding, assisting and abetting in the solicitation of legal business and the procurement through solicitation, directly and indirectly, of retainers, written and oral, and agreements authorizing the defendants, as such attorneys, to perform and render legal services for and on behalf of persons injured in accidents.

FRANK S. HOGAN
District Attorney

Affidavit of Angelo T. Cometa in Opposition

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

State of New York
County of New York } ss.:
City of New York

ANGELO T. COMETA, being duly sworn, deposes and says that:

I am counsel for the petitioners in the disciplinary proceedings herein.

I make this affidavit in opposition to the application of respondent, made pursuant to an order to show cause signed by Justice Francis L. Valente of this Court, on February 15, 1965, directing the petitioners to disclose to the respondent all statements, testimony or documents relating to the proceeding in the possession of petitioners, by whomsoever made and relating to Irving Dansker, Bert J. Sapot or the respondent which have not already been disclosed to respondent. The supporting affidavit ("respondent's affidavit") is made by Mr. Leonard Feldman, counsel for the respondent, and is sworn to February 15, 1965.

This is essentially the same application made by respondent prior to the commencement of hearings in the instant matter. That motion, which, among other things, sought a discovery and inspection of all of the testimony and all of the statements and exhibits in the possession

of the petitioners with regard to this proceeding, was in all respects denied by order of this Court dated October 3, 1963. Thereafter, respondent's motion for leave to reargue, or, in the alternative, for leave to appeal to the Court of Appeals from the order of October 3, 1963, was in all respects denied by order dated November 19, 1963.

Subsequently, respondent moved in the Court of Appeals for leave to appeal from the order of October 3, 1963, which motion was dismissed by order of the Court of Appeals on January 9, 1964, 13 N. Y. 2d 1119.

Respondent's affidavit fails to include the fact that the Supreme Court of the United States denied review of the ruling of the Court of Appeals. *In the Matter of Anonymous #1* v. *Co-ordinating Committee,* 377 U. S. 933.

THERE IS NO LEGAL JUSTIFICATION FOR THE RELIEF SOUGHT BY RESPONDENT

It is respectfully submitted that the order of this Court of October 3, 1963 precludes respondent's instant application. This matter has been fully adjudged on its merits, the facts being the same today as they were upon respondent's prior application, except that the first motion was made before the disciplinary hearings commenced. Respondent now seeks the same relief denied him on his prior application, but this time application is made upon completion of petitioners' case.

Petitioners have zealously followed the *Rosario* rule in making available to respondent the prior testimony of witnesses after the completion of such witnesses' testimony at the trial. Counsel for respondent has sought to convey the impression that your affiant's predecessor

indicated that he would make a more extensive disclosure than is provided for by law. Affiant's predecessor's statement, quoted at length on page 12 of respondent's affidavit, states that "when a witness for petitioners *completes his testimony at the trial upon direct examination,* a copy of the transcript of his testimony in the preliminary inquiry will then be delivered to respondent upon request * * *." Any attempt to amplify such clear language is gratuitous.

Respondent's affidavit in support of the instant application is replete with speculation, rather than fact. The application in question would appear to be an attempt on respondent's part to embark on an extensive fishing expedition into petitioners' case. No reasonable interpretation of due process would grant respondent the right to conduct an investigation of petitioners' investigation. In effect, granting respondent's application for the extensive discovery and inspection sought herein, would give him that right.

No issue of due process is presented by respondent's motion herein. Petitioners have adopted every reasonable safeguard to protect respondent's rights. Respondent was fully apprised of the institution of petitioners' investigation; he was represented by counsel of his own choice upon his interrogation during the preliminary investigation; other witnesses interrogated during the preliminary investigation were granted the right of counsel; respondent has heard petitioners' case against him in hearings held before the Referee, during which time he was confronted by witnesses who testified against him and was given the fullest opportunity to cross-examine such witnesses; and he has had full use of the prior testimony of all witnesses who have so testified for such purposes as he sees fit.

Affidavit of Angelo T. Cometa in Opposition

Respondent's affidavit has sought to capitalize on the fact that respondent was neither indicted nor named as a conspirator in the criminal proceedings relating to former colleagues of respondent who testified in the disciplinary proceedings against him. This position of respondent would indicate a failure to perceive a basic difference between the quantum of evidence necessary for criminal indictment and that which will give rise to a disciplinary action against an officer of the Court.

The points of law which petitioners believe to be applicable to the instant matter will be presented in petitioners' brief to be handed up to this Court on the return date.

CORRECTIONS OF STATEMENTS OF FACT MADE BY RESPONDENT

Respondent's affidavit notes that the background of this proceeding is important and should be before the Court, and thereupon proceeds at length (nine pages) to make several allegations of fact. It is necessary for your affiant to challenge the accuracy of many of these statements.

Petitioners have never alleged an exclusive referral of cases by Dansker & Sapot (two of petitioners' witnesses in the disciplinary proceedings herein) to respondent, as is alleged on pages 2 and 3 of respondent's affidavit. (A copy of the petition in respondent's disciplinary proceeding is annexed hereto and made a part hereof.)

Contrary to respondent's allegation (page 3 of respondent's affidavit) that the partnership of Dansker & Sapot was in existence "for some time" before referrals were made to respondent, testimony clearly indicates that the time in question was of very short duration. The fact is that the partnership actually began the practice of law in and about the month of September, 1958 and its first referral to respondent occurred in October, 1958.

Affidavit of Angelo T. Cometa in Opposition

Respondent's affidavit has sought to cast an aura of conspiracy about the disposition of a 1961 New York County criminal indictment against Dansker and Sapot. The unfortunate use of emotional language such as "conspiracy to purchase freedom from jail" (page 14 of respondent's affidavit) is obviously designed to support this spurious contention. The trial testimony herein clearly establishes that no promise nor inducement was given either Dansker or Sapot to cause or persuade them to give testimony before petitioners.

Respondent's affidavit alleges (page 7) that one Spring, another of petitioners' witnesses, admitted a relationship with Dansker & Sapot but "asserted his privilege and refused to testify to his involvement with others." The fact is that Spring, an auto body repairman, testified at respondent's trial that the respondent was clearly implicated in the active solicitation of personal injury cases.

Contrary to respondent's assertion (page 14), the testimony of Dansker and Sapot concerning the conspiracy charge against the respondent has not been substantially refuted by other witnesses. It is true that dates and places may vary according to each witness, but it should be noted that from four to six years have elapsed since the salient events have transpired.

CONCLUSION

There is no justification in fact or law for granting the relief sought in respondent's instant application.

WHEREFORE, it is respectfully requested that respondent's motion in all respects be denied.

ANGELO T. COMETA

(Sworn to on February 25, 1965.)

Exhibit Annexed to Affidavit in Opposition

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT:

The \petition of Jacob Burns, Peter H. Kaminer and Magnus Lipton, as members of the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, respectfully alleges upon information and belief:

I. That the Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department have heretofore, to wit on the 3rd day of February, 1959, made an order which provided that there shall be conducted, under the supervision of the Presiding Justice of this Court, and by the members of the Co-ordinating Committee on Discipline, the petitioners herein, a continuous examination and study, among other things, of the conduct of attorneys and those employed by or associated with them, in the solicitation, prosecution and defense of causes involving personal injury claims.

II. That Jacob Millstein was duly admitted to practice on April 20, 1931 in the State of New York by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, held in the County of New York. Respondent has practiced law continuously

since his admission, with his office being presently located at 320 Broadway, Borough of Manhattan, City of New York.

III. That pursuant to the order of this Court referred to in paragraph I hereinabove, the said Co-ordinating Committee on Discipline did conduct and is now engaged in conducting such investigation, and in the course thereof made an inquiry into the professional conduct of the respondent and heard evidence on the matters set forth in paragraph IV hereof.

Respondent testified before the Co-ordinating Committee on June 20, 1961, October 9, 1962, December 18, 1962 and February 7, 1963. 291 pages of his sworn testimony were taken.

In addition, numerous other witnesses were examined under oath during the course of said preliminary investigation.

On the 12th day of March, 1963, the Co-ordinating Committee on Discipline recommended that the Appellate Division, First Department, authorize and direct Messrs. Jacob Burns, Peter H. Kaminer and Magnus Lipton, or any one of them, as members of the Co-ordinating Committee on Discipline, to present to this Court charges of professional misconduct against the respondent herein and appoint Henry Weiner, Walter H. Schulman and Joseph B. Castleman, attorneys and counsellors-at-law and members of the legal staff of the Co-ordinating Committee on Discipline, to prosecute the charges referred to in this petition, pursuant to the provisions of Section 90 of the Judiciary Law of the State of New York, and in the exercise of the inherent powers of this Court in such matters.

Exhibit Annexed to Affidavit in Opposition

On the 14th day of March, 1963, this Court made an order authorizing Messrs. Jacob Burns, Peter H. Kaminer and Magnus Lipton, or any one of them, as members of the Co-ordinating Committee on Discipline, to institute this proceeding and duly appointed Henry Weiner, Walter H. Schulman and Joseph B. Castleman, as attorneys to prosecute this proceeding, and this petition is presented pursuant to said order.

IV. That Jacob Millstein, the respondent, has been guilty of professional misconduct as an attorney-at-law as follows:

CHARGE No. 1

That during a period beginning on or about September or October 1958 through December, 1960, respondent engaged in a corrupt conspiracy with Irving Dansker and Bert J. Sapot, then young attorneys-at-law, pursuant to which respondent advised, instructed and directed Dansker and Sapot in certain improper methods and procedures of soliciting retainers from victims of accidents to perform legal services in connection with claims for personal injuries and property damage; and pursuant to such conspiracy respondent agreed to pay, and did pay, certain expenses incurred by Dansker and Sapot, and agreed to assist, and did assist, Dansker and Sapot financially, in soliciting such retainers, and in enlisting tow truck operators and auto body repairmen, including Frank Kopec, Morris Spring and Vincent Maggio, to solicit such retainers; and it was the understanding between the respondent and Dansker and Sapot that Dansker and Sapot would be the attorneys of record in such cases

and respondent would act of counsel to them in the prosecution and settlement of such claims, and that the legal fees in such matters would be shared equally, one-half thereof to Dansker and Sapot and one-half thereof to respondent, after reimbursement of expenses advanced, including advances made for payments to solicitors of retainers and payments allegedly made by respondent to insurance company personnel in connection with settlements of claims; and this corrupt conspiracy between respondent and Dansker and Sapot existed and was carried out during the period of time aforementioned with respect to retainers to perform legal services in connection with numerous claims for personal injuries and property damage; and the said Irving Dansker and Bert J. Sapot were indicted on February 7, 1961 by a Grand Jury of the County of New York pursuant to a twenty-count indictment charging grand larceny in the first degree (one count), forgery in the second degree (four counts), (all of the foregoing involving the Padilla case referred to in Charge No. 6 below), conspiracy to solicit retainers to prosecute personal injury claims (one count), solicitation of retainers (thirteen counts), employment of others to solicit retainers (one count), in violation of sections 1290, 887, 580, 270-a, and 270-d of the Penal Law of the State of New York; and on May 12, 1961 said Irving Dansker and Bert J. Sapot executed resignations as members of the Bar of the State of New York; and on May 25, 1961 their names were stricken from the roll of attorneys and counsellors-at-law; and said Irving Dansker and Bert J. Sapot having agreed to make restitution with respect to the Padilla case aforementioned, pleaded guilty on June 28, 1961 to the ninth count in the indictment (a

misdemeanor) to cover the indictment, and on July 21, 1961 were sentenced by Hon. Thomas Dickens, a Judge of the Court of General Sessions of the County of New York, to a suspended sentence with probation, from which Bert J. Sapot was discharged on August 7, 1962 and Irving Dansker was discharged on October 30, 1962.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Professional Ethics of the New York State Bar Association, and in violation of Rules II and IV-G and 2 and 8 of the Special Rules pertaining to the Conduct of Attorneys promulgated by the Appellate Division of the Supreme Court of the State of New York, First Department, and that by such course of conduct the respondent brought the profession into public disrepute.

CHARGE No. 2

That in order to disguise and conceal the cash transactions employed to finance the corrupt conspiracy between respondent and Dansker and Sapot referred to in Charge No. 1 hereof, respondent advised, instructed and directed Dansker and Sapot in improper and unethical practices, including the following practices:

a) Respondent directed Dansker and Sapot to pay him part in cash and part by check upon the distribution of proceeds of settlements from time to time;

b) In certain cases respondent himself or through his office staff advised Dansker and Sapot that he had incurred special investigation disbursements, generally approximately 5% of the amount of the settlement, when in truth and in fact no such investigation disbursements

had been incurred in the particular case; and respondent had previously advised Dansker and Sapot that this would be his procedure in some cases to obtain and pay a percentage of the amount of the settlement to insurance company personnel in order to consummate such settlement.

c) Dansker and Sapot were advised by respondent to overpay clients by check whenever clients were agreeable, upon the understanding that the clients would repay in cash to Dansker and Sapot the excess above the amount properly due them, which cash excess Dansker and Sapot sometimes used to finance the corrupt conspiracy with respondent charged herein.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Ethics of the New York State Bar Association, and that by such course of conduct respondent brought the profession into public disrepute.

CHARGE No. 3

That respondent had a close relationship for many years with one John Cecil Badway, a supervising adjuster of personal injury claims employed by Aetna Casualty and Insurance Company at 111 Fulton Street, Borough of Manhattan, City of New York, and the respondent on the dates hereinafter specified caused the following amounts of cash to be deposited in a checking account maintained by said Badway in the Bankers Trust Company at 176 Broadway, City of New York:

May 31, 1960	— $100.00
June 10, 1960	— 150.00
June 21, 1960	— 350.00
Total	— $600.00

It is alleged that such payments by respondent to Badway had the effect of corruptly influencing Badway in connection with settlements of personal injury claims negotiated by respondent with personnel of Aetna Casualty and Insurance Company.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Ethics of the New York State Bar Association, and that by such course of conduct respondent brought the profession into public disrepute.

CHARGE No. 4

That with respect to the personal injury claims and property damage claims covered by the corrupt conspiracy between respondent and Dansker and Sapot referred to in Charge No. 1 hereof, respondent advised, instructed and directed Dansker and Sapot in improper and unethical methods of prosecution of personal injury claims in the following respects:

a) with respect to creating and building up false claims of loss of time from employment and false claims of loss of earnings:

1) Respondent advised Dansker and Sapot to suggest to the claimants to stay away from their place of employment as long as possible, in some instances two to eight weeks, notwithstanding the fact that the claimants were able to go to work much sooner;

2) Respondent advised Dansker & Sapot to advance, where necessary, monies to the claimants to replace, at least in part, the earnings of the claimants during the period covered by subparagraph (1) above;

Exhibit Annexed to Affidavit in Opposition

b) With respect to obtaining false medical reports and doctors' bills:

1) Respondent advised Dansker and Sapot in procedures resulting in false medical reports and bills, including the obtaining of doctors' stationery upon which respondent caused to be type false information with respect to the number of visits, if any, of the claimant to the doctor, the nature of the injuries, the extent of treatment and the amount of the bill.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Ethics of the New York State Bar Association, and that by such course of conduct respondent brought the profession into public disrepute.

CHARGE No. 5

That with respect to the personal injury claims and property damage claims covered by the corrupt conspiracy between respondent and Dansker and Sapot referred to in Charge No. 1 hereof, respondent advised, instructed and directed Dansker and Sapot not to file a Statement of Retainer and Closing Statement in every case where the rules of this Court in effect at the time required such filing, and the purpose of such failure to file stated by respondent to Dansker and Sapot was to conceal from the Court the true number of personal injury claims in which Dansker and Sapot and respondent represented the claimants, the source of referral of such claims, and the disposition thereof.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29,

32 and 34 of the Canons of Ethics of the New York State Bar Association, and that by such course of conduct respondent brought the profession into public disrepute.

CHARGE No. 6

That in the course of engaging in the corrupt conspiracy between respondent and Dansker and Sapot referred to in Charge No. 1 hereof, Bert Sapot was the attorney of record, and respondent was of counsel, representing one Jose Antonio Padilla in his claim for personal injuries arising out of an accident allegedly having occurred on January 11, 1960; and in due course respondent told Dansker and Sapot to bring Padilla to respondent's office for a physical examination by the insurance carrier's doctor and Dansker and Sapot subsequently informed respondent that after much effort Padilla could not be located; at which time respondent instructed or suggested to Dansker and Sapot that they obtain the services of a Spanish-speaking male person and bring such person to the physical examination at respondent's office for the purpose of impersonating Padilla, which Dansker and Sapot did, enlisting the services of one Benjamin Cruz Melendez, who was examined in respondent's office in place and instead of Padilla by Dr. H. M. Dicker on behalf of Travelers Insurance Company on the 14th day of March, 1960; and respondent informed Dansker and Sapot that he negotiated a settlement of the Padilla claim with The Travelers Insurance Company for $3,000, and requested them to obtain Padilla's signature to a general release in such sum, and Dansker and Sapot informed respondent that Padilla still could not be found, whereupon respondent instructed or suggested to Dansker and

Sapot that one of them should sign Padilla's name to such release and the other should acknowledge such signature as notary public, notwithstanding knowledge on respondent's part that Padilla did not know of said settlement, had not approved it and had not authorized anyone to sign his name to a release; and Dansker and Sapot carried our respondent's instructions or suggestions and brought to him a release of $3,000 to which Dansker had signed Padilla's name and Sapot had acknowledged such signature as notary public; and respondent forwarded such release to The Travelers Insurance Company which issued its check for $3,000 dated April 18, 1960 to the order of Antonio Padilla and Bert Sapot; and Dansker endorsed the name of Antonio Padilla on the back of said check pursuant to respondent's instructions, when respondent knew Padilla had not authorized such endorsement, and from the proceeds of such settlement check respondent received from Dansker and Sapot a check of $677.75 on April 23, 1960, plus an additional amount in cash of approximately $300.00.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Ethics of the New York State Bar Association, and that by such course of conduct respondent brought the profession into public disrepute.

CHARGE No. 7

That in July of 1960, after having been informed by Dansker and Sapot of their decision to cease to solicit and prosecute personal injury claims in furtherance of the corrupt conspiracy with respondent outlined in Charge No. 1, the respondent caused a meeting to be held at the

uptown office of Dansker and Sapot, and among those present at said meeting were Morris Spring and Vincent Maggio, who were then tow truck operators, at which time it was indicated to the said tow truckers that respondent was associated with Dansker and Sapot in the solicitation and prosecution of personal injury claims, and respondent informed the tow truckers that Dansker and Sapot were leaving the negligence field, but respondent was staying on, and respondent requested the tow truckers from then on to deal directly with him, and respondent stated he would pay the tow truckers a flat sum for each case solicited as a down payment against 10% of any final settlement amount; and at that time respondent stated that he or his staff would be available at all times to handle any personal injury claims solicited by the tow truckers, and thereafter Morris Spring and Vincent Maggio did solicit retainers of personal injury claims for respondent.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Professional Ethics of the New York State Bar Association, and in violation of Rules 2 and 8 of the Special Rules pertaining to the Conduct of Attorneys promulgated by the Appellate Division of the Supreme Court of the State of New York, First Department, and that by such course of conduct the respondent brought the profession into public disrepute.

CHARGE No. 8

That in the month of August 1960 respondent attempted to enter into a corrupt conspiracy with a young attorney, Ira Raab, and the respondent made a proposal to Raab

involving suggestions of improper and unethical solicitation and prosecution of personal injury claims, and respondent informed Raab that respondent had extensive sources for obtaining retainers to prosecute personal injury claims, and connections with insurance carrier adjusters to assure favorable settlements, and that both the sources of referrals and the insurance carrier adjusters had to be paid from the proceeds of settlements, and that after the deduction of such expenses and any other expenses incurred, the net legal fees would be apportioned between respondent and Raab based upon legal services rendered by Raab in the processing of such personal injury claims; and Raab rejected this proposal made by respondent.

It is charged that the foregoing conduct on the part of respondent was in violation of Canons 15, 22, 27, 28, 29, 32 and 34 of the Canons of Ethics of the New York State Bar Association, and that by such course of conduct respondent brought the profession into public disrepute.

Exhibit Annexed to Affidavit in Opposition

CHARGE No. 10

That with respect to personal injury claims and property damage claims where attorneys other than Dansker & Sapot were attorneys of record and respondent was of counsel, respondent, prior to July 1, 1960, admittedly failed to comply with the provisions of Rule IV-A of the Special Rules of the Appellate Division of the Supreme Court of the State of New York, First Department, which required attorneys in certain cases to file in the office of the Clerk of the Appellate Division Statements as to Retainer, in that the respondent admittedly failed to file any such Statements as to Retainers as required by said Rule with respect to numerous claims where he acted of counsel to attorneys of record for claimants and participated in the contingent fee.

Such violation of the Rule constitutes professional misconduct under Rule IV-G of the Rules of the Court governing the conduct of attorneys in effect at the time.

CHARGE No. 11

That with respect to the personal injury claims and property damage claims covered by the corrupt conspiracy between respondent and Dansker and Sapot alleged in Charge No. 1 hereof, respondent failed to comply with Rule 4 (e) and Rule 4 (2) (a) of the Special Rules relating to the conduct of attorneys and counsellors-at-law of the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department, which require attorneys in certain cases to file or join in Closing Statements filed by the attorney of record, containing certain information with respect to such claims or actions disposed of, in that respondent failed to file or join in the filing of such Closing Statements within the time and

as required by said Rules with respect to the claims for damages resulting from personal injuries alleged with respect to the following persons whose names and the year in which each such claim arose are hereinafter set forth: Adelphina Agrant (1960); Nonserrate Santoni (1960); Pedro Bersudez (1960); Oscar Barrizonte (1960); Radamer Martinez (1960); Santos Figueroa (1960); Jose Figueroa (1960); Pablo Ildefonso (1960); Rafael Bauza (1960); Joseph Fighera (1959); Frank Fighera (1959); Anthony Bologna (1959); Richard Houser (1959); Bobby Joe Creer (1959); Harold Allen (1959); Viola Allen (1959); Charles Bouie (1958); John Boyd (1960); Julio Carrion (1960); Salvadore Colon (1959); Antonio Sansidro (1959); Jose Antonio Padilla (1960); Hamon C. Delgado (1959); Pablo Santiago (1959); Cruz Guitterez (1959); Nicolas De Rose (1960); Louis De Falco (1960); Henry D. Giambettista (1959); David Gordon (1959); Moses P. Hollis (1959); Lena Hamm (1959); Lester Johnson (1960); Booker T. King (1958); Charles Manigo (1960); Gloria Martinez (1958); Julita Martinez (1958); Charles SeNemes (1960); Louis Santiago Oltega (1958); Edwin Perez (1960); Lucy Rivera (1960); Antulo Rivera (1960); Ismael Cruz (1960); G. Vasquez (1960); Rafael Rivera (1959); Maria Rivera (1959); Carmen Rodrigues (1960); Ben Segara (1959); Emelina Colon (1959); James C. Smith (1959); Monserrate Vega (1959); John Williams (1959); Charles Wilson (1959); Leonard Yates (1959).

Such violation of the Rules constitutes professional misconduct under Rule IV-G and Rule 2 of the Rules of the Court governing the conduct of attorneys in effect at the time.

Exhibit Annexed to Affidavit in Opposition

CHARGE No. 12

That with respect to personal injury claims and property damage claims where attorneys other than Dansker & Sapot were attorneys of record and respondent was of counsel, respondent, from January 1, 1957 to July 1, 1960, admittedly failed to comply with the provisions of Rule 4 (c) of the Special Rules relating to the conduct of attorneys and counsellors-at-law of the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department, which required attorneys in certain cases to file Closing Statements, or join in Closing Statements filed by the attorney of record, containing certain information with respect to such claims or actions disposed of, in that respondent admittedly failed to file or join in the filing of such Closing Statements as required by said Rule with respect to numerous claims for damages resulting from personal injuries where respondent acted of counsel to attorneys of record for claimants and was compensated by an interest in a contingent fee.

Such violation of the Rule constitutes professional misconduct under Rule IV-G of the Rules of the Court governing the conduct of attorneys in effect at the time.

CHARGE No. 13

That with respect to the personal injury claims and property damage claims covered by the corrupt conspiracy between respondent and Dansker and Sapot alleged in Charge No. 1 hereof, where Dansker & Sapot were attorneys of record and respondent was of counsel, respondent failed to comply with Rule 4(c) and Rule 4(2)(a) of the Special Rules relating to the conduct of attorneys and counsellors-at-law of the Appellate Division of the Supreme Court of the State of New York in the First

Exhibit Annexed to Affidavit in Opposition

Judicial Department, which require attorneys in certain cases to file Closing Statements, or join in Closing Statements filed by the attorney of record, containing certain information with respect to such claims or actions disposed of, in that respondent failed to disclose therein all payments and/or disbursements made by him or by the attorneys of record of which he had knowledge, including payments made to solicitors of retainers from claimants who allegedly suffered personal injuries, and disbursements allegedly made for investigation expense.

Such violation of the Rules constitutes professional misconduct under Rule IV-G and Rule 2 of the Rules of the Court governing the conduct of attorneys in effect at the time.

V. That the petitioners annex hereto and make a part of this petition the affidavit of Henry Weiner, sworn to the 28th day of March, 1963.

WHEREFORE, your petitioners respectfully submit this matter to the Court and ask that such action be taken as justice may require.

Dated: New York, N. Y.
March 28, 1963.

Jacob Burns

Peter H. Kaminer

Magnus Lipton

HENRY WEINER,
Attorney for Petitioners,
Office and P. O. Address:
100 Centre Street
Borough of Manhattan
New York 13, N. Y.

Exhibit Annexed to Affidavit in Opposition

State of New York
County of New York } ss.:
City of New York

JACOB BURNS, being duly sworn, deposes and says:

I am a member and Chairman of the Co-ordinating Committee on Discipline and one of the petitioners above-named, I have read the foregoing petition and know the contents thereof and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief are the records of the proceedings had before the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association referred to in said petition and the papers and documents submitted to the said Committee and the statements contained in the annexed affidavit of Henry Weiner sworn to on the 28th day of March, 1963.

.....
Jacob Burns

Sworn to before me this 28th
day of March, 1963

.....
Daniel J. McMahon
Notary Public—State of New York
No. 31-7861850 New York County
Term Expires March 30, 1964

Exhibit Annexed to Affidavit in Opposition

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
CITY OF NEW YORK

HENRY WEINER, being duly sworn, deposes and says:

That he is the attorney for Jacob Burns, Peter H. Kaminer and Magnus Lipton, as members of the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, the petitioners herein.

Upon information and belief, the matters set forth in paragraphs I, II and III of the petition herein are true. The sources of deponent's information and the grounds for his belief are the records kept on file in the office of the aforementioned Co-ordinating Committee on Discipline and a communication received from the Clerk of the Court of Appeals of the State of New York.

Upon information and belief, the matters set forth in paragraph IV of the petition herein are true. The source of deponent's information and the grounds for his belief are the records of the proceedings had before the Co-ordinating Committee on Discipline referred to in paragraph III of the petition herein and the papers and documents submitted to the said Committee.

Henry Weiner

Sworn to before me this
28th day of March, 1963

Daniel J. McMahon
Notary Public—State of New York
No. 31-7861850 New York County
Term Expires March 30, 1964

Order Denying Motion for Reargument or Leave to Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 13th day of April, 1965.

Present—Hon. Charles D. Breitel, Justice Presiding
" Francis L. Valente,
" James B. M. McNally,
" Harold A. Stevens,
" Samuel W. Eager, Justices

[Same Title]

The above named respondent having moved for leave to reargue Motion No. 1 of March 2, 1965, which motion sought an order directing the Co-ordinating Committee on Discipline to disclose all statements and testimony, and pertinent documents, relating to respondent or to two disbarred attorneys, Irving Dansker and Bert J. Sapot, or, in the alternative, for leave to appeal to the Court of Appeals, and for other relief,

Now, upon reading and filing the order to show cause, dated March 31, 1965, with proof of due service thereof, and the affidavits of Leonard Feldman, sworn to March 29, 1965, and Sam W. Galowitz, sworn to April 5, 1965, in support of said motion, and the affidavit of Angelo T. Cometa, sworn to March 31, 1965, in opposition thereto, and after hearing Mr. Leonard Feldman and Mr. Sam W. Galowitz for the motion, and Mr. Angelo T. Cometa, opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied.

Enter:

Vincent A. Massi
Clerk

Recd by Mail 4/23/65

Affidavit in Support of Motion for Reargument or Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

State of New York
County of New York } ss.:

LEONARD FELDMAN being duly sworn, deposes and says:

I am a member of the firm of Eiber, Okin, Rafsky & Feldman, attorneys for the respondent above-named, and make this affidavit in support of the respondent's motion for leave to reargue or in the alternative for leave to appeal to the Court of Appeals.

No prior application for this relief has heretofore been made except as may be construed to have been made in the prior proceedings.

Annexed hereto and made part hereof, is the order of this Court dated March 18, 1965, which denied respondent's motion to require the Co-ordinating Committee on Discipline* to disclose and make available to the respondent the testimony, statements, etc., of all persons interrogated by said Committee and which persons were not called as witnesses on the petitioners' case against the respondent. For the purposes of this motion all papers submitted on the motion from which the aforesaid order resulted are incorporated herein by reference and made a part hereof.

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* Hereinafter referred to as petitioners.

Affidavit in Support of Motion for Reargument

Reargument is sought because, it is respectfully submitted, this Court has, in denying the respondent's motion, decided contrary to the mandate of the United States Supreme Court (as set forth in respondent's brief in support of said motion) and contrary to the mandate of the Court of Appeals as expressed in *People* v. *Rosario,* 9 N. Y. 2d 286, and as recently amplified in *People* v. *Malinsky,* 15 N. Y. 2d 86, decided January 7, 1965.

It is respectfully submitted that the issue raised by respondent's motion is one of absolute first impression in that this is the first case in which petitioners have admitted that they are possessed of statements, testimony and evidence garnered from persons who have not been called as witnesses on petitioners' case and whom petitioners do not intend to call—petitioners having rested their case.

The record is also clear that among the witnesses whom petitioners have not called and concerning whom petitioners have offered no evidence in explanation of petitioners' failure to call, are witnesses whom petitioners have alleged to be direct participants in the very transactions claimed by petitioners to be the acts of misconduct upon which the present proceeding against respondent is founded.

The record is clear that evidence and information vital to the respondent's defense is being withheld.

The Supreme Court of the United States and the Court of Appeals have both held that a failure to disclose evidence material to the defense of an action constitutes a denial of due process.

It is respectfully submitted that a disciplinary proceeding by its very nature is such as would require a full and

complete disclosure lest a deprivation of a valuable and respected license be risked by a withholding of evidence and the consequent denial of due process thereby.

The Referee, before whom the instant disciplinary hearings are being held, recognized the seriousness of the issue raised and adjourned the hearings to permit the motion to be made before this Court in the first instance. He recognized that a serious and vital issue affecting the respondent's rights were involved, especially since the petitioners had concluded their presentation of evidence and rested their case against respondent with the admission that there was other evidence which they were withholding and refusing to disclose.

In logic, law, morals and ethics, the petitioners' position is untenable. If the evidence they have is of no value to the respondent's defense, then there can be no harm or prejudice in its disclosure. If the evidence is of value to the respondent's defense, then its withholding by petitioners in a proceeding of this type cannot be permitted.

It is for the foregoing reasons that reargument is sought and, it is respectfully submitted, should be granted.

Failing the grant of reargument then, it is respectfully submitted, leave to appeal to the Court of Appeals should be granted. In an area of law and the administration of justice as sensitive as that involved in a disciplinary proceeding, especially where the respondent has been a long and honored member of the Bar, and where the issue is one of first impression and of vital public interest, the issue should be submitted to the Court of Appeals for resolution.

It is now settled that in criminal cases a defendant is entitled to the fullest disclosure of all of the evidence. As

a matter of fact, not only is this the law applicable to all the states, but in New York an assistant district attorney who withheld evidence was disciplined by this Court.

It is respectfully submitted that a disciplinary proceeding is, in effect, of equal seriousness as a criminal prosecution, in many instances more so. To deny to a lawyer the same rights guaranteed to the lowliest criminal is to make a distinction which would appear to deny to lawyers in the exercise of their licenses the equal protection of the laws.

Any issue as serious as this should be passed upon by the Court of Appeals for it involves not only the rights of the respondent, but the rights of all lawyers. It should be pointed out to this Court that the Second Department required a disclosure of all evidence even *before* hearings began (see the file of the Second Department in Matter of Friedman, 17 A.D. 2d 644). In *Matter of Friedman,* and on a lesser showing than that involved here, a Justice of the Supreme Court ordered a disclosure in advance of hearings and the files of the Second Department disclose that that court refused to vacate the order, thus affirming the requirement of disclosure.

The divergence of views between this Department and the Second Department requires resolution by the Court of Appeals lest the mere happenstance of geography determine the rights of a respondent to make a complete defense.

An adjournment *sine die* of the pending hearings is required pending determination of this motion because the ability of the respondent to prepare his defense is directly involved in this motion. As previously pointed out, the petitioners have completed presentation of their case. Now

that this Court has denied respondent's motion for disclosure, the Referee has directed that the respondent commence his defense on April 5, 1965, and continue from day to day thereafter until concluded. Manifestly, the respondent's defense and his ability to prepare it are directly involved with this motion. If the respondent has available to him the evidence which petitioners have thus far withheld, his defense will be materially different. If respondent is required to proceed with his defense without the benefit of a full disclosure he will be completely prejudiced.

It is important for the Court to realize that the charges do not deal with any present conduct, but with events which concluded many years ago. Petitioners have at no time claimed that respondent's present conduct or his conduct in recent years in any way transgresses the interest of the profession, the courts or the public.

Accordingly, no public or private interest runs the risk of injury by a delay in the hearings until the issue is resolved.

It is because the Referee proposes the hearings to resume and the respondent to proceed to his defense on April 5, 1965, that the present motion is brought on by order to show cause rather than regular notice of motion.

It is for the reasons hereinbefore set forth that respondent respectfully submits that the motion for reargument or in the alternative for leave to appeal to the Court of Appeals, should be granted.

LEONARD FELDMAN
Leonard Feldman

(Sworn to on March 29, 1965.)

Affidavit in Opposition to Motion for Reargument

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
CITY OF NEW YORK

ANGELO T. COMETA, being duly sworn, deposes and says:

I am counsel for the petitioners in the disciplinary proceeding herein.

I make this affidavit in opposition to respondent's application for an order granting reargument, or in the alternative, leave to appeal to the Court of Appeals, from an order of this Court, entered March 18, 1965, and further, seeking an adjournment *sine die* of the instant disciplinary proceeding pending the disposition of this Court or the further order of this Court.

The petition charging the respondent with professional misconduct was served upon respondent on March 29, 1963. Respondent's answer was served upon petitioners on May 1, 1963, after which this Court by order dated May 16, 1963, appointed Hon. Paul Shaw as Referee to hear and report.

Respondent, on August 26, 1963, served upon petitioners a notice of motion for an order granting discovery and inspection of all testimony, statements and exhibits in petitioners' possession, returnable September 10, 1963. This Court denied respondent's application, unanimously, by order dated October 3, 1963.

Affidavit in Opposition to Motion for Reargument

Respondent, on October 28, 1963, served upon petitioners a notice of motion returnable in this Court on November 6, 1963, for an order granting leave to reargue or in the alternative for leave to appeal to the Court of Appeals, which was unanimously denied by order dated November 19, 1963.

Thereafter, respondent's application for leave to appeal to the Court of Appeals was denied by the Court of Appeals by order dated January 9, 1964.

Respondent proceeded to petition the United States Supreme Court for a writ of certiorari, which was denied on May 18, 1964.

All of the above proceedings took place before commencement of respondent's trial before Referee Shaw on November 9, 1964. In the intervening period,—some three and one-half months,—the trial has proceeded through seventeen days of testimony, and on the last hearing date, February 10, 1965, petitioners completed their case.

Respondent, on February 15, 1965, served petitioners with an order to show cause returnable to this Court, directing petitioners to disclose all statements, testimony and documents in petitioners' possession not already disclosed, and relating to one Dansker, one Sapot and the respondent. The motion was denied, unanimously, by this Court, on March 18, 1965.

Your affiant submitted an affidavit sworn to on February 25, 1965, and a memorandum of law, dated February 1965, both in opposition to respondent's application of February 15, 1965, since denied. Included among petitioners' points of law in affiant's memorandum is the statement of fact that this matter has been fully adjudicated. In fact, with the instant application, respondent has been before this

Court *three times* with the same demand. The only distinction between his original application returnable September 10, 1963, and those of February 19, 1965 and the instant proceeding is the time element: respondent's first application for universal discovery took place before commencement of the trial; his most recent applications were made after the petitioners' case had been presented. By some process of reasoning, it might be assumed that such fragmentary applications could be continuously made throughout the pendency of the trial, almost *ad infinitum.*

Respondent's rights have been fully protected throughout the instant proceeding. The *Rosario* rule of full disclosure as warranted by law has been scrupulously followed by petitioners throughout this matter. Petitioners provided respondent with the transcript of the witnesses' testimony in the preliminary inquiry and any pertinent exhibits or notes; upon completion of the testimony of every witness upon direct examination at respondent's trial.

Not one scintilla of legal justification appears to support respondent's present application. Respondent seeks, and has sought with every application for disclosure, what is clearly beyond the ordinary remedies available to any party, whether the action be civil or criminal. Respondent is not content with his rights under *Rosario;* he would embark on a fishing expedition of the first magnitude if given the opportunity to do so. Some pertinent language of the Court of Appeals may be in order here:

> "• • • It does not mean that the defense will be able to go on a tour of investigation seeking generally useful information. Our decision presupposes that the statement relates to the subject matter of the

witness' testimony, that it is to be used for impeachment purposes *only after direct examination.*" *People* v. *Rosario,* 9 N. Y. 2d 286 [emphasis supplied].

People v. *Malinsky,* 15 N. Y. 2d 86, fully supports *Rosario*: [at page 90]

"* * * We made it unmistakably clear in *People* v. *Rosario* (9 N Y 2d 286) that defense counsel must be permitted to examine *a witness'* prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be made of it on cross-examination, provided only that the statement 'relates to the subject matter of *the witness'* testimony and contains nothing that must be kept confidential' (p. 289). And, obviously, it matters not whether *the witness* is testifying upon a trial or at a hearing. In either event, 'a right sense of justice' entitles the defense to ascertain what *the witness* said about the subject under consideration on an earlier occasion." [Emphasis supplied]

Affiant has read *Matter of Friedman,* 17 A.D. 2d 644, and has concluded that there is nothing in the reported opinion which supports respondent's contention. Furthermore, it would appear that respondent's reference to the file in the *Friedman* case is a most novel approach to citing the law.

It is respectfully submitted that any adjournment of the pending hearings could vitally affect the ends of justice in the instant matter. As has already been indicated, this trial began in November, 1964 and any further delay, especially one pending the disposition of an application denied twice over, is not warranted in law or in fact.

Affidavit in Opposition to Motion for Reargument

Respondent has had ample time to prepare his defense since first apprised of the petitioners' case against him over two years ago. Furthermore, petitioners concluded their case almost two months ago, which has given respondent more than ample opportunity to assess the evidence adduced against him, and prepare for his defense. Respondent has been given every scrap of information, testimony, notes and exhibits, referring to every witness who took the stand on direct. Respondent complains that he has been denied the same rights "guaranteed to the lowliest criminal" (page 4 of respondent's instant affidavit). It is difficult to understand his statement in the light of petitioners' complete disclosure under *Rosario*.

In a classic case of gratuitous speculation, respondent muses that if he had available to him evidence which he claims petitioners have withheld, his defense "will be materially different." By what standard does respondent characterize the quality of his defense, based as it is, upon alleged "withheld evidence" which he presumably has never seen?

Petitioners urge that it is of utmost importance that the respondent's trial be completed as expeditiously as possible. The fact that some of the misconduct alleged transpired in 1960 is not germane here, but rather that the conduct charged, as a whole, is so reckless and so patently oblivious to the ethical obligations owed society by every member of the Bar, that a disposition should be forthcoming immediately.

There is no justification in law or in fact for granting the relief sought by respondent herein.

WHEREFORE, it is respectfully requested that respondent's motion in all respects be denied.

ANGELO T. COMETA
Angelo T. Cometa

(Sworn to on March 31, 1965.)

Reply Affidavit of Sam W. Galowitz on Motion to Reargue or for Leave to Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } s.:

SAM W. GALOWITZ, being duly sworn, deposes and says:

I am associated with Leonard Feldman, attorney for respondent in the above proceeding and make this affidavit in reply to that of petitioner's counsel.

Concerning the alleged prior adjudication of the pending motion, it is too well settled to require any further discussion at this point that a denial of procedural relief at one point in a proceeding is not res adjudicata if the relief becomes appropriate at a later point in the proceeding. It is the respondent's position that at this juncture of this proceeding a denial of the relief sought by respondent raises a serious issue of due process which will taint this proceeding from this point on unless cured in a manner not prejudicial to the respondent. It is apparent from a reading of the papers that the discovery requested prior to the hearing, might very well have been denied on the basis of the court's reasoning that at that time the respondent did not sustain any injury. However, at this stage of the hearing when the petitioner concedes that there is other evidence that they have failed to disclose, there has been a denial in fact of "due process" to the respondent.

Reply Affidavit of Sam W. Galowitz on Motion to Reargue or for Leave to Appeal

Petitioners' reasoning on *Rosario* is incomprehensible. We deal here not with the technique of *Rosario,* but the philosophy of that holding. We are concerned here with the witnesses who did not produce and the evidence being withheld by petitioners—a withholding which petitioners' counsel has already conceded. The same is true with regard to *Malinsky.*

Regarding *Matter of Friedman,* 17 A.D. 2d 644, the plain fact of the matter is that there is an unreported decision by the Second Department (as referred to in the moving papers) which supports respondent's position. Novel or not, a reading of that opinion, available as it is in the file of the Second Department, is essential. That decision should not be ignored because it was not published.

It serves no useful purpose for petitioners' counsel to indulge in forensics or histrionics in a matter as serious as this. A withholding of evidence has occurred and is continuing. If we are to speak of the ends of justice then let us speak in terms of a result fairly achieved by a full disclosure of all the evidence. Until such a full disclosure is made, the respondent will continue to be deprived of a fair trial and due process. Such is the issue, for the "ethical obligations amid society", at least in this jurisdiction, is that every trial be conducted in accordance with the standards of due process as such standards have been defined by the Supreme Court of the United States.

SAM W. GALOWITZ
Sam W. Galowitz

(Sworn to on April 5, 1965.)